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No. 86-1846

In The
Supreme Court of the United States
October Term, 1986

BURNS SCOTT HOWARD,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

When the total award by the jury of $100,000 was less than the accrued wage loss at the time of trial, and future economic damages were not awarded by the jury, is there a special or important reason to review on Writ of Certiorari a Judgment in a Federal Employers' Liability Act case where the trial court instructed the jury not to consider any possible effect of inflation and did not give an instruction on reduction to present value?

IN THE UNITED STATES SUPREME COURT
CASE NO. 86-1846

BURNS SCOTT HOWARD, PETITIONER,

vs: *RULE 28.1 LISTING*

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation, RESPONDENT.

The Chesapeake and Ohio Railway Company is a wholly owned subsidiary of CSX Corporation, Richmond Virginia.

The following is a listing of the subsidiaries (except wholly owned subsidiaries) and affiliates of the respondent, The Chesapeake and Ohio Railway Company, and of CSX Corporation:

Augusta and Summerville Railroad Company
Beaver Street Tower Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company
Allegheny and Western Railway Company
The Baltimore and Philadelphia Railroad Company
Clearfield and Mahoning Railway Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
The Home Avenue Railroad Company
The Baltimore and Cumberland Valley Rail Road Extension Company
Richmond-Washington Company ("R-W")
Richmond, Fredericksburg and Potomac Railroad Company
Mid Allegheny Corporation ("MAC")

The following is a listing of Joint Ventures of CSX Corporation and its subsidiaries and affiliates:

Arabian Container Terminals, Limited
Asia Terminals Limited
Entremar, S.A.
Sea-Land Container Terminal Administration Co., Ltd.
World Feederships, Inc.
Energy Dominion
Gemetal Distribution Services Company
Glebe Road Associates
Glebe Road II Associates
Glebe Road III Associates
Glenway Associates
LightNet
Richmond Center Associates
St. George Seaport Associates

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No. 86-1846

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BURNS SCOTT HOWARD,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, The Chesapeake and Ohio Railway Company, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking reversal of the Sixth Circuit's opinion in this case.

OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 812 F.2d 282 (1987). (App. 1)

———o———

COUNTERSTATEMENT OF THE CASE

The Respondent sets forth the following Counter-statement of the case because the statement of facts set forth in petitioner's Petition for Writ of Certiorari are not consistent with the evidence that was introduced in the trial of this case and considered by the Court below.

The petitioner, Burns Scott Howard, was hired by the respondent on July 24, 1978, and is a member of the United Transportation Union.

In July, 1981, the petitioner told Frank H. Davis, local chairman for the Fireman, United Transportation Union, and Assistant General Chairman of the United Transportation Union, Russell, Kentucky, that he had hurt his shoulder on his farm either putting up hay or tobacco in his barn.

Approximately two to three weeks after the first conversation, the petitioner was still complaining about his left shoulder to the union officer. (TR 535-538)

On August 4, 1981, approximately three weeks after the first conversation with the union officer and approximately one week after the second conversation with the union officer, the petitioner claimed that he sustained an injury while working for the respondent as a skateman. He

claimed that as he attempted to mount a railroad car, he tripped over a tie plate lying in the walkway beside the tracks. There were no witnesses to the alleged accident. (TR 129-130)

The petitioner reported the accident to his supervisor, who observed that the petitioner's eyes were clear, his pupils were not dilated, there was no blood or scratches of any type on his face or head, the petitioner was clear-headed and had no difficulty with his memory, and the petitioner did not tell his supervisor that he had been rendered unconscious or injured his head in the accident. (TR 499)

At the waiting room of the hospital, the petitioner and his supervisor filled out approximately half of the accident report, in which the petitioner gave his name, Social Security number, Railroad ID number, address, job location, railroad department, the location, division, date, year and hour of the accident, daylight or dark, the name of his immediate supervisor, and particularly whether there was any loss of consciousness. The petitioner did not indicate loss of consciousness on the accident report, and he initialed that particular statement on the accident report. (TR 501-503, 505)

The petitioner was examined at the hospital and no mention was made of any pain or discomfort other than left shoulder and chest wall.

There was no treatment by the doctor at the hospital by way of sutures, stitches, bandages or anything on his head or face. (TR 504)

When he got to his supervisor's office, the petitioner and his supervisor completed the accident form and peti-

tioner initialed the items and signed the form. (TR 505-506)

It is significant to note at this point that the petitioner furnished to his supervisor the 5-digit car number of the railroad car that he claims was involved in the accident in question. The petitioner at that time was able to see the car's number as the car came toward him at the time of the alleged accident, even though he claims that the area was dark. The petitioner was also able to recall the number of the car after he had left the scene of the accident, and went to his supervisor's office and the hospital, even though he now claims to have been rendered unconscious and suffered a head injury at the time of the accident. The car number is not furnished to the skatemen prior to the railroad car's coming down the track.

On September 30, 1981, the petitioner was seen by Dr. Bernard Bacevich and treated for having post-traumatic scapular bursitis. Dr. Bacevich performed three CT scans and only one showed some possible bulging in the lumbar disc space; the others did not. A myelogram was performed which did not show bulging, and other X-rays of the back were made and were found to be normal. (TR 231, 233-234)

On cross-examination, Dr. Bacevich stated that he could find no reason for the petitioner's subjective complaints of pain, that the condition of traumatic bursitis can come from any type of accident, and sometimes can be seen in people without injury or are unable to tell the exact cause. At no time was any mention made by the petitioner to this doctor that at the time of his alleged accident, the petitioner was

rendered unconscious or had suffered a head injury. (TR 265-271, 276-278, 280)

Dr. Bacevich referred the petitioner to Dr. Phillip Edelstein, a psychiatrist in Cincinnati, Ohio, because petitioner was allegedly suffering from depression. Dr. Edelstein testified that at the time of his first examination on January 15, 1983, the petitioner showed a low-average range of intelligence and had psychiatric problems. Dr. Edelstein diagnosed the problem as post-traumatic syndrome with major depression and anxiety.

The petitioner filed a lawsuit in the United States District Court, Eastern District of Kentucky under 45 U.S.C. 51, *et seq.*, and Complaint was served on the respondent on May 23, 1984.

Dr. Edelstein last saw the petitioner on December 15, 1984, with a diagnosis of post-traumatic syndrome with major or psychotic depression. (TR 199) At no time during the treatment by Dr. Edelstein or hospitalizations of the petitioner, was there any mention of the petitioner's being rendered unconscious or having suffered a head injury in the alleged accident of August 4, 1981.

On December 17, 1984, the petitioner was examined at the request of the respondent by Dr. Kearns Thompson, a Board Certified Orthopedic Surgeon in Lexington, Kentucky. Dr. Thompson testified that there was no evidence of any residuals of injury to the lower back area and there was no evidence of any abnormal pressure on any of the nerves. (TR 568-569) The petitioner did not mention to Dr. Thompson that he had been rendered unconscious or that he had suffered a head injury in the alleged accident of August 4, 1981. (TR 568-569)

Dr. Thompson could find no indication of need for medical treatment, and the only functional impairment the petitioner had was as the result of the shoulder surgery, and that impairment would not affect his ability to work as a brakeman for the respondent. Dr. Thompson awarded him 2½ percent permanent impairment to the body as a whole. (TR 581-582)

On January 2, 1985, the petitioner was first seen at the request of the respondent, by Dr. Robert Phillip Granacher, Jr., a physician with specialties in psychiatry, forensic psychiatry, sleep medicine, and a medical professor of psychiatry at the University of Kentucky Medical School in Lexington, Kentucky. Dr. Granacher performed a mental status examination, laboratory testing, level functioning, electrolytes, as well as psychiatric testing. (TR. 395) On that examination, Dr. Granacher found the petitioner to have elements of psychomotor retardation; he was slow in his thoughts and movements. On the mental status examination, it was found that the petitioner had no clinically significant defects of memory, and had no clinically evident signs of language disorder. (TR 397)

The first mention of the petitioner's being rendered unconscious at the time of the alleged accident came about when the petitioner's attorney sent the petitioner to Dr. Ronald Kurt Ebert, a psychologist in Cambridge, Pennsylvania on January 14, 1985, over three years after the alleged accident. Dr. Ebert, as a psychologist, testified that based upon his testing, the petitioner "had dysfunction primarily in two regions of the brain; in the non-dominant hemisphere, the right, the back and the right side which caused his problems in visual perception, visual memory; it

also caused him some problems in language functioning, and also are the cause of his depression." (TR 330) In answer to a question by the petitioner's attorney, Dr. Ebert stated:

> Q. Did the history reveal parameters of loss of consciousness?
>
> A. Well, *it's very difficult to say if there was a loss of consciousness or not.* From what Mr. Howard stated from—there was no active recollection; he did not know how long he was lying on the ground after he fell off the railroad car before his co-worker came up to meet him. Under the circumstances of someone lying out in the middle of a switching yard in the dark, it's very, *very difficult for him to determine if he had been unconscious;* if he had, how long he had been unconscious. (emphasis added)

The petitioner was tested in the office of Dr. Irvin M. Gerson at the request of Dr. Ebert on January 15, 1985 and June 14, 1985. A brain stem evoked response test was performed which was found to be normal, and an electroencephalogram was run and was normal as to resting, and borderline as to the computer analysis that was performed by Dr. Gerson's employees. (TR 474-475) It was Dr. Gerson's opinion that the petitioner suffered from a brain dysfunction. (TR 378)

The petitioner was again seen by Dr. Robert P. Granacher on June 27, 1985, approximately one month prior to trial. At that time, Dr. Granacher performed a Luria Nebraska Neuropsychological Battery which showed evidence of brain dysfunction. (TR 401)

Dr. Granacher testified that there are many causes for this problem and stated

> Well, there are many causes. The kinds of causes that I normally see are brain tumors, multiple sclerosis, Alzheimer's disease, various conditions of the brain matter itself, debilitating conditions, brain infections, strokes, blood clots, head trauma, encephalitis, meningitis. Anything that can affect the brain tissue itself could produce abnormal results on this kind of examination.
>
> . . . .
>
> Blood vessel problems; blood vessels to the brain, carrying blood to the brain, thereby taking oxygen to the brain; the vascular system is the blood vessel system. (TR 402)

When Dr. Granacher was asked a hypothetical question which assumed facts basically as set forth in this Counter-statement of the Case as to whether or not a casual relationship existed between the condition he found in the petitioner on the two examinations and the accident that occurred in the Russell Yard on August 4, 1981, he stated that within the limits of reasonable medical probability, he could not draw the conclusion that the dysfunction shown on the Luria Nebraska was related to the accident. At the trial, Dr. Granacher testified as follows:

> Q. . . . what factor or factors [do] you rely upon in support of your position in your answer to that question here today.
>
> A. Well, there's a number of factors. The first factor is, this gentleman being able to recite all those digits after supposedly having a severe head injury, to be able to give back your Social Security number and give back a seven-digit employee number, remember the digits off the railroad car, do those kinds of things would be extremely unusual in someone. Anybody who has ever seen boxing matches knows when

a person is stunned or knocked down in the boxing match, for a significant period of time they cannot give relevant information back. That's one factor.

The second factor is, this man was examined within a few hours at the emergency room at a local hospital . . . and there is no evidence on those medical records of any head injury, any suspicion of head injury, any neurological dysfunction. Mr. Howard was in with the doctor by himself, had to give his own history to the doctor; no one else went in to the doctor to give it to him. So that's a factor.

The third factor, . . . Mr. Howard's lawyers had sent him to a psychiatrist in Virginia, by the name of Dr. Rosen. They had him examined February 12, 1982, six months after his accident. . . . Dr. Rosen also had psychological tests done. In Dr. Rosen's report there is no evidence of brain damage. Dr. Rosen said he thought Mr. Howard was suffering a stress disorder from the trauma of wrenching his arm, but nothing about brain damage, head injury, brain dysfunction. That's a factor.

Another factor is, this man was examined by Dr. Proctor, his personal doctor, who said nothing about brain damage. He was examined by Dr. Bacevich, orthopedic surgeon, who said nothing about brain damage; and he was sent to Dr. Edelstein approximately a year and a half after his accident and Dr. Edelstein admits him to the Bethesda Hospital, evaluates him and said the same thing Dr. Rosen did; that he had some type of stress disorder related to the trauma of having his arm wrenched and that he was depressed; again, no mention made of brain dysfunction or brain damage.

Taking all that together and adding it together leads me to the conclusion . . . this man has brain dysfunction in my judgment, in my judgment, something happened from the time of this accident in the railroad yard to the time I examined him in 1985.

Another factor is, Mr. Koenig's law firm sent this man to Philadelphia to be examined by Dr. Gerson. Dr. Gerson didn't do a personal examination of this man; he examined electrical records. He never laid eyes on the patient, never touched the patient, and never ordered C-T scan of his brain to see if he had a brain tumor, never had somebody check his spinal fluid, never did a confirmatory test necessary to show that what Dr. Gerson found was related to this accident, rather than some neurological condition that this man may well have that nobody has diagnosed because he has never been evaluated for it.

So those factors together lead me to the conclusion that you can't say that this accident that occurred on August 4, 1981 produced the dysfunction that I saw when I tested this man on June 27, 1985. (TR 407-409)

During the trial of July 17-23, 1985, Dr. William E. Cobb, an economist, testified on behalf of the petitioner that the petitioner's wage loss up to July 1, 1985, was $101,380 (TR 437), that he would have earned for 1981, $8,828; for 1982, $17,002; for 1983, $14,100; for 1984, $25,-360; and for 1985, $26,918. This was for loss of wages and did not include fringe benefits, but the figure of $101,380 was the wage loss and fringe benefits lost up until July 1, 1985.

Dr. Cobb testified as follows:

What does all that mean? Well, to make a rough estimate of economic damages, you could take the wages —say, in this case I estimated roughly $35,000 a year earning capacity; multiply it by the number of years you think that wages will be lost; you get a very rough approximation of what the lost earning capacity is.

So, despite all the rigamarole of trying to find what inflation is, how much you discount in terms of the

> *interest that will be earned, almost all of that washes out. So that . . . you can take the current wages, multiply it by the number of years and get a rough estimate.* (TR 431-437) (emphasis added)

Further, referring specifically to the petitioner's future lost wages, Dr. Cobb testified:

> And, again, a rough way to get that is to *take $35,000 a year for some forty years into the future, you would not be too far off with economic damages.* (TR 441) (emphasis added)

When cross examined concerning his statements on inflation, the economist testified that he was offsetting inflation and interest. What he admitted was ". . . inflation is on both sides of the teeter-totter . . . so I was offsetting inflation from inflation; inflation was the same". (TR 459-460)

After the trial of the case and before argument, the respondent renewed its motion to strike the testimony of the economist and further moved for a directed verdict in favor of the respondent. The court overruled all motions. (TR 596-598)

The trial judge then presented to the attorneys his proposed Charge to the jury (TR 599-613), and a discussion and objections followed. The attorney for the petitioner did not object to the instruction or the portion of the charge that concerns inflation, nor did he tender to the court an instruction concerning inflation. The attorney for the respondent tendered an instruction which asked the jury to award only present cash value of such future wage loss. The Court did not submit this instruction to the jury.

After closing argument of counsel, the Court charged the jury. (TR 644-656) Included in the charge, the court instructed the jury "you are not to single out any one instruction alon[e] as stating the law, but must consider the instructions as a whole". (TR 644)

As to expert witnesses, the court charged the jury

> You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely. (TR 647-648)

The court further instructed the jury

> On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of the injury, tangible and intangible; they are not an attempt to restore the Plaintiff—they are an attempt to restore the Plaintiff; that is, to make him whole or as he was immediately prior to his injuries. (TR 652)

and

> [Y]ou are instructed that you should not take into account any possible effect or present—or future inflation one way or the other. With regard to wages or earnings, the evidence and figures presented concerning those claims related to gross earnings; that is, earnings before income taxes and other deductions, not take-home pay. (TR 653)

Only after the arguments of counsel, and after the court charged the jury, did the attorney for the petitioner

first raise, in any manner, the issue of the court's charge as to inflation.

> MR. KOENIG: . . . Secondly, with respect to the instruction on inflation and taxes, the Court has said specifically, that the jury "In considering any element of damage to be experienced in the future, you are instructed that you should not take into account any possible effect of present or future inflation one way or another." I think that goes directly in the face of *Bock* [*sic*] *versus Penn Central,* and the *Jones-Laufler* [sic] case which has been cited.
>
> THE COURT: Why didn't you say that? . . . You were asked to consider the charge and you didn't mention that before.
>
> MR. KOENIG: I was not that—
>
> THE COURT: You didn't mention it before I charged the jury. (TR 657)
>
> . . . .

—————o—————

SUMMARY OF ARGUMENT

The charge to the jury, taken in its entirety, was based upon the testimony introduced in the trial of this case, and is not prejudicially erroneous. The issues raised by the petitioner were fully considered and correctly decided by the Court below.

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ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE PETITIONER CAN SHOW NO SPECIAL OR IMPORTANT REASON FOR GRANTING THE WRIT, AS REQUIRED BY SUPREME COURT RULE 17.1.

Supreme Court Rule 17.1 in part provides that review on writ of certiorari will be granted "only when there are special and important reasons therefor." There is no special or important reason to review on Writ of Certiorari because the total award by the jury of $100,000 was less than the accrued wage loss at the time of trial, and future economic damages were not awarded by the jury.

28 U.S.C. 2111 provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." *See also,* Rule 61, Federal Rules of Civil Procedure ("the court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties").

The doctrine of harmless error expressed above is applicable to claimed errors in jury instructions, *see, Kotteakos v. United States,* 328 U.S. 750 (1946); *Teal v. E. I. DuPont De Nemours and Co.,* 728 F.2d 799 (6th Cir. 1984); *Lewis v. Strickland Truck Lines,* 505 F.2d 164 (6th Cir. 1974), and such errors provide a basis for reversal of the trial court judgment only where there has been prejudice to the substantial rights of the complaining party.

Flanigan v. Burlington Northern, Inc., 632 F.2d 880 (8th Cir. 1980).

Moreover, the burden is on the petitioner to demonstrate prejudice to his substantial rights. *Westwood Chemical, Inc. v. Owens-Corning Fiberglass*, 445 F.2d 911 (6th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).

It is well settled that in determining whether a claimed error in a jury instruction was harmless or prejudicial, the court must consider the instructions as a whole and must affirm the jury verdict if, taken as a whole, the charge fairly and accurately "presents the law *as it applies to the case at hand*". *Haislah v. Walton*, 676 F.2d 208, 212 (6th Cir. 1982) (emphasis added). *See also, Bach v. Ucho*, 697 F.2d 741 (6th Cir. 1983); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983).

The trial court's instructions on damages specifically informed the jury that they should assess petitioner's damages in an amount found to be "full, just and reasonable compensation for all of the plaintiff's damages . . ." (TR 652), that damages could be awarded for "earnings or working time lost in the past *and any loss of ability to earn money in the future*" (TR 653) (emphasis added), and that compensatory damages are designed to *put the employee in as good a position as he would have been had the accident not occurred*:

> [C]ompensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury—tangible and intangible . . . *they are an attempt to restore the plaintiff, that is, to make him whole or as he was immediately prior to his injuries.* (TR 652) (emphasis added)

In *Rodgers v. Fisher Body Div., G.M.C.*, 739 F.2d 1102 (6th Cir. 1984), the court stated that "in the case of an injury of an economic nature, the injured party is to be placed, as nearly as possible, in the position he would have been in had the wrong not occurred." 739 F.2d at 1107.

The trial court's instructions adequately informed the jury of the general measure of damages for future lost wages. The petitioner objects to approximately four lines out of the approximately 11 pages of charge to the jury. Moreover, when the court's instructions are viewed against the backdrop of the relevant evidence introduced by the petitioner in the trial of this case, it is clear that petitioner was not prejudiced by the trial court's instruction concerning inflation.

Petitioner's economist, Dr. William Cobb, testified that the jury could make a rough approximation of petitioner's economic loss by simply multiplying petitioner's current annual wages ($35,000.00) by the number of years he could have been expected to work (forty years). (TR 441, 436-437) Both expressly and by inference, Dr. Cobb told the jury that they need not consider inflation, real wage increases or interest rates in assessing petitioner's economic loss:

> *So, despite all the rigamarole of trying to find what inflation is, how much you discount in terms of the interest that will be earned, almost all of that washes out. So that . . . you can take the current wages, multiply it by the number of years and get a rough estimate.* (TR 431-437) (emphasis added)

Further, referring specifically to the petitioner's future lost wages, Dr. Cobb testified:

> And, again, a rough way to get that is to take $35,000 a year for some forty years into the future, *you would not be too far off with economic damages.* (TR 441) (emphasis added)

Dr. Cobb offered the jury a factual and theoretical approach for calculating petitioner's future wage loss which did not include any consideration of inflation, interest or real wage increases; an approach that "would not be too far off with economic damages". *Again, the trial court's instructions told the jury that they could award damages for loss of ability to earn money in the future and that such compensatory damages are designed to make the employee whole; to make him as he was prior to his injuries.* Clearly, on the basis of Dr. Cobb's testimony and the court's instructions, taken as a whole, even without considering inflation, the jury could have awarded petitioner damages in an amount roughly approximating his claimed future wage loss.

An additional consideration relating to the effect of the inflation instruction, viewed in the context of the entire charge, is that the jury was not instructed that the award for future wage loss should be discounted to present value.

In this case, since the jury was not instructed to discount to present value, the trial court's instruction concerning inflation could not have had any tendency to undercompensate the petitioner. In *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2nd Cir. 1980), the court stated: "When a discount rate is adjusted to reflect inflation, it must be applied to a stream of earning *calculated without regard to inflation. . . .*" 634 F.2d at 40

(emphasis added). Obviously, where there has been no instruction to reduce to present value, it is entirely proper for the jury to calculate future earnings without regard to inflation. If anyone is harmed by such a procedure, it is the respondent. Manifestly, the error, if any, in the trial court's instruction concerning inflation was not prejudicial to the petitioner.

In making the determination of whether claimed error is harmless or prejudicial, the court is not restricted to an examination of the jury instructions alone. *Kotteakos v. United States, supra,* at 762 (emphasis added). *See also* 28 U.S.C. 2111 ("[T]he court shall give judgment *after an examination of the record* without regard to errors or defects which do not affect the substantial rights of the parties.") (emphasis added).

Further, the actual outcome of the proceeding is an important factor in assessing the effect of the error:

> To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. . . . And the question is . . . what effect the error had or reasonably may be taken to have had upon the jury's decision . . . *If when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand.* . . .

Id. at 764. (emphasis added). Although *Kotteakos v. United States* was a criminal case, the "harmless error" statute which the Court discussed was applicable to civil cases as well. *Id.* at 762.

Here, petitioner claimed to have sustained injury to his shoulder and back, as well as a brain dysfunction, as a

result of the alleged accident of August 4, 1981. Based on the evidence in the record, the jury could properly find that petitioner was *not* permanently disabled as a result of respondent's negligence, and therefore, that damages for future lost wages need not be assessed. That the jury did so find is evident from the fact that they awarded petitioner $100,000, even though petitioner's economist testified that petitioner's past wage loss at the time of trial was $101,380. (TR 437)

It is well settled, as a general principle of law, that errors in jury instructions as to particular elements of damage are harmless where the jury does not allow recovery for that item of damage. 5A C.J.S. *Appeal and Error,* 1773(2); 75 Am.Jur.2d, *Trial,* 923.

Based on the total award for damages of $100,000 in this case, it is clear that the jury never considered the issue of damages for future wage loss, having found that petitioner was not permanently disabled *as a result* of the alleged accident of August 4, 1981. Accordingly, the trial court's instruction concerning inflation "did not influence the jury, or had but very slight effect . . .". *Kotteakos v. United States, supra* at 764. The error, if any, was harmless.

The issues raised by the petitioner in his Petition were fully considered by the Court below, and the respondent believes the Court below correctly decided these issues.

In his Petition, the petitioner raised the issue of the respondent's closing argument. On this issue, the Court below stated:

> The defendant railroad did not call any economist to the stand, and in final argument to the jury the railroad's counsel spent most of his time attempting to minimize the extent of the plaintiff's physical and mental problems and arguing that they were not the result of the alleged accident. Defense counsel devoted only three transcript pages of argument to the question of economic damages. Pointing out that plaintiff's actual wages in his last full year of employment had been about $16,000, counsel argued that if the jury awarded $160,000, and the plaintiff invested that amount at 10% per annum and never invaded the principal, plaintiff could receive a lifetime income of $16,000 per year and still leave $160,000 to his wife and children at his death. *Plaintiff's counsel did not object to this argument.* (App. 7) (Emphasis added)

As to the issue of future earnings, the Court stated:

> The jury was not obliged to find the defendant railroad responsible for any disability that may have existed at the time of trial, of course, and if the jury intended to award nothing for loss of future earnings, it is immaterial whether instructional error might have led the jury to think the maximum allowance for loss of future earning capacity was "roughly" $1.5 million rather than $1.7 million. (App. 9)

Concerning the role of inflation in projected earnings, the decision of the Court below also stated:

> . . . because plaintiff's own evidence indicated that inflation in projected earnings is "washed out" by the inflation component of the interest rate used in present value calculations, and inflation therefore makes no difference in the determination of the value of future earnings. (We note also that although the "total wash-out" or "total offset" concept has not been accepted as a mandatory federal rule of decision, it is prominently featured on the menu of economic

> theories from which courts may currently choose in FELA cases. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 *supra.* The "total offset" method of calculating the present value of future earnings depends on the validity of the method's implicit assumptions as to the relationship between the future course of wage rates and the future course of interest rates, and the time may come when those assumptions will be thought so wide of the mark that the method will have to be abandoned. *In the case at bar, however, there is affirmative—and uncontradicted—evidence that the assumptions are currently tenable.*) (App. 13) (Emphasis added)

The Court below reached the conclusion that the jury charge in its entirety fairly represented the law as it applied to the case at hand, and stated:

> Taking as a whole the charge given in this case, and considering it in relation to the evidence that was before the jury, we think the judgment entered on the jury's verdict ought to be affirmed. The charge as given would have permitted the jury to award roughly $1.5 million for future lost earnings, if the jury had taken all of plaintiff's evidence at face value, and we are not persuaded that the charge, read in light of the testimony, entitles plaintiff to another shot at a higher verdict. (App. 13-14)

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CONCLUSION

For the reasons stated above, the respondent, The Chesapeake and Ohio Railway Company, respectfully submits that there are no special or important reasons for

granting a Writ of Certiorari in this case, and respectfully urges this Court to deny the present Petition.

Respectfully submitted,

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APPENDIX

Burns Scott HOWARD,

Plaintiff-Appellant,

v.

The CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant-Appellee.

No. 85-6106.

United States Court of Appeals,
Sixth Circuit

Argued Oct. 16, 1986.

Decided Feb. 17, 1987.

Frank H. Warnock, Warnock and Warnock, Greenup, Ky., Ralph E. Koenig (argued), Minneapolis, Minn., Michael L. Weiner, for plaintiff-appellant.

Paul Hobbs (argued), Ashland, Ky., for defendant-appellee.

Before NELSON and RYAN, Circuit Judges, and ENSLEN, District Judge.

DAVID A. NELSON, Circuit Judge.

Dissatisfied with a $100,000 jury verdict he recovered in a Federal Employers' Liability Act action against the defendant railroad, plaintiff Burns Scott Howard has appealed the judgment entered on that verdict. Although the trial court declined to give a jury instruction requested by the defendant railroad to the effect that future earnings ought to be discounted to their present value, should the jury decide to award damages for loss of future earning capacity, plaintiff contends that the trial court nonetheless erred in instructing the jury to disregard the effect of inflation in considering any such award. Finding, on the particular record before us, no prejudicial error, we shall affirm the judgment.

I

Plaintiff Howard, who was 26 years old at the time of trial in mid-1985, was graduated from high school in 1977. He went to work for the railroad in the summer of 1978, and worked there full-time (except for periodic furloughs occasioned by economic conditions) until August 4, 1981, when he was allegedly injured in an accident. He did not work thereafter.

Plaintiff's evidence showed that on the night in question he was working as a "skateman" in a rail yard, where his job was to climb aboard moving coal cars and bring them to stop by setting their handbrakes; that the cars were being sent down the classification tracks at an excessive rate of speed, the yard was not adequately il-

luminated, and the work area had debris in it; and that plaintiff lost his footing as he tried to climb aboard one of the cars, tripped over a piece of debris, and fell to the ground, injuring his left shoulder, arm and rib cage. Plaintiff was taken to the office of a trainmaster, who, after making a visual inspection for injuries, drove him to a nearby hospital. The hospital charts and accident reports filled out at the time indicated no loss of consciousness and no head injury; plaintiff seemed mentally alert, and the pupils of his eyes were not dilated. He subsequently contended, however, that the accident—which was not witnessed by anyone else—must have knocked him unconscious.

Plaintiff went home after having been seen in the hospital emergency room, but he was hospitalized two days later for back and shoulder pain. An othopedic surgeon operated on his shoulder in May of 1982. By the summer of that year plaintiff was showing signs of mental depression. In January of 1983 a psychiatrist saw him and made a diagnosis of post-traumatic syndrome, with major depression and anxiety. In 1985 a neuropsychologist made a diagnosis of brain dysfunction; that diagnosis was subsequently confirmed by other experts, including a psychiatrist who examined plaintiff for the defendant railroad.

The evidence was in dispute as to whether the brain dysfunction diagnosed in 1985 could be said, with reasonable medical certainty, to have been caused by the accident plaintiff claimed to have suffered in 1981. Plaintiff's expert witnesses opined that there was a direct causal relationship, and the defendant railroad's expert denied that any such causal relationship had been established. The defendant's expert testified that although plain-

tiff's condition might possibly have been caused by a fall that knocked him out, the condition could also have been the result of intercerebral multiple sclerosis, Alzheimer's disease, a brain tumor, a blood clot, meningitis, infection, deoxygenation of the brain during general anesthesia, or various other causes that had not been ruled out. Plaintiff's lawyers argued to the jury that the brain damage was "the real thing in this case . . . the most devastating injury of all," and a major question before the jury was whether plaintiff had in fact shown that he suffered from brain damage caused by his alleged fall at work.

The defense presented testimony from a union official, one Frank Davis, to the effect that plaintiff had complained, several weeks before the alleged accident, of having hurt his left shoulder while doing farm work. Mr. Davis testified that there had been discussion of the possibility of plaintiff's receiving disability payments from the railroad on account of his shoulder condition, and that he (Davis) had made an anonymous telephone call to a railroad claim agent to suggest that plaintiff's claim was fraudulent. Mr. Davis' testimony was vigorously challenged on cross-examination, and other employees who were supposed to have heard the original conversation denied that it had taken place.

With respect to plaintiff's earnings prior to the accident, plaintiff did not disagree with records showing that his railroad wages (exclusive of the value of fringe benefits) had been $5,122 in 1978, $8,587 in 1979, $16,237 in 1980, and $9,969 in 1981. Through an economist, Dr. William Cobb, plaintiff presented evidence that the fringe benefits and wages lost thereafter up to the beginning of the month in which the trial was held, July of 1985, had

come to slightly over $100,000. The railroad made no significant attempt to suggest that this $100,000 actual earnings loss figure was not accurate.

Dr. Cobb also testified on what plaintiff's future earning capacity would have been had he not been permanently disabled at the time of trial. Dr. Cobb explained that he had attempted to estimate the future "real" wage increases that the plaintiff would have received over the course of a normal working career with the railroad, expressing those increases in constant 1985 dollars without any element of inflation. Dr. Cobb said he also attempted to determine the present value of that stream of future earnings, discounting the earnings at an unspecified "real" interest rate that might have obtained in an environment free of inflation and of any expectation of inflation. With adjustments for anticipated taxes on both the wages plaintiff could have been expected to earn if he had remained at work and the income he could be expected to receive on a lump sum damage award, and with further adjustments for what Dr. Cobb believed to be reasonable (but unspecified) assumptions as to life expectancy, furlough rates, risk of illness or job loss because of economic conditions, and so forth, Dr. Cobb testified that in his opinion the present value of the loss of future wages and fringe benefits experienced by a permanently disabled 26 year old railroad worker with the plaintiff's earnings history and seniority would be slightly over $1.7 million.

Asked on cross-examination if there was a prediction of future price inflation in any portion of his calculations, Dr. Cobb testified that there was only one place in his economic model where it had been necessary to use an estimate for inflation: that was in projecting the taxes on the in-

come from a hypothetical lump sum damage award. The inflation rate used in this connection, Dr. Cobb testified, was 7.24% per annum, carried out through the year 2028.

Dr. Cobb did not say what figure his economic model would have yielded had he assumed an inflation rate of zero, but he did testify that a rough approximation of the value of plaintiff's earning capacity could be arrived at by taking $35,000 a year (plaintiff's estimated wages plus fringe benefits for the first half of 1985 having come to about half that amount) and simply multiplying $35,000 by the remaining number of years plaintiff might have worked. Assuming, as Dr. Cobb invited the jury to do, that plaintiff would have worked 43 more years, this computation (43 X $35,000=$1,505,000) would peg the future earning loss at roughly $200,000 below the figure produced by the more sophisticated economic model. The jury could thus have inferred that if Dr. Cobb has assumed no inflation when he made his sophisticated present value calculation, he would have come up with an estimated earning loss of roughly $1.5 million as opposed to $1.7 million.

The reason inflation did not play a bigger part in Dr. Cobb's calculations, as he explained, was that in his view the market rate of interest appropriately used in making a present value calculation approximates the percentage rate at which wages can be expected to rise in the future. Inflation rates have historically been a major component of interest rates, Dr. Cobb said, and whatever assumptions are made about the course of future inflation, inflation should not be a significant factor in the calculation of economic loss: the inflation element in the present value calculation offsets the inflation element in the calculation of future earnings. "[D]espite all the rigamarole of trying to

find what inflation is," he testified, "how much you discount it in terms of the interest that will be earned, almost all of that washes out." When asked, on cross-examination, if he claimed to be able to predict what the inflation rate will be 10, 15 or 20 years from now, Dr. Cobb answered "No. I'm saying, in fact, it doesn't make any difference. . . ."

The defendant railroad did not call any economist to the stand, and in final argument to the jury the railroad's counsel spent most of his time attempting to minimize the extent of the plaintiff's physical and mental problems and arguing that they were not the result of the alleged accident. Defense counsel devoted only three transcript pages of argument to the question of economic damages. Pointing out that plaintiff's actual wages in his last full year of employment had been about $16,000, counsel argued that if the jury awarded $160,000, and if plaintiff invested that amount at 10% per annum and never invaded the principal, plaintiff could receive a lifetime income of $16,000 per year and still leave $160,000 to his wife and children at his death. Plaintiff's counsel did not object to this argument.

The jury was charged by the trial court that if plaintiff were found to have been injured as a consequence of the defendant railroad's negligence, the jury should assess as damages no more and no less than the amount found, by a preponderance of the evidence, to be full, just and reasonable compensation for all of the loss so caused. Among the elements of damage the jury was told it should consider, to the extent it found them proved by a preponderance of the evidence, were "any earnings or working time lost in the past and any loss of ability to earn money in the

future. . . ." In considering any element of future damage, the trial court continued, "you are instructed that you should not take into account any possible effect [of] present . . . or future inflation one way or the other." The jury was also told that any award would not be subject to income taxes, "and you should not consider any such taxes in fixing the amount of your award. . . ."

Significantly, the jury charge did not include an instruction, requested by the defendant railroad, on reducing future earnings to present value—this despite the fact that in a colloquy outside the presence of the jury, the trial judge and counsel for both of the parties had all agreed that there must be a reduction of future earnings to present value. Counsel for the railroad did not specifically renew his request for a present value instruction after the charge had been given, but plaintiff's counsel specifically objected to the instruction that the jury "should not take into account any possible effect of present or future inflation one way or another." The court declined to change its instructions.

The jury returned a verdict for the plaintiff and against the defendant railroad, assessing the plaintiff's actual damages in the amount of $100,000. There were no special interrogatories, and the jury was not asked to state whether it found the accident had caused any disability likely to extend beyond the time of trial. The plaintiff moved for a new trial on damages, contending that the jury should not have been instructed to disregard inflation in determining future damages. The motion for a new trial was denied without opinion, and this appeal followed.

II

A claimed earnings loss of over $100,000 having already accrued by the time of trial, it may seem inherently improbable that the jury's award of damages totaling $100,000 was intended to include anything at all for loss of future earning power. The jury was not obliged to find the defendant railroad responsible for any disability that may have existed at the time of trial, of course, and if the jury intended to award nothing for loss of future earnings, it is immaterial whether instructional error might have led the jury to think the maximum allowance for loss of future earning capacity was "roughly" $1.5 million rather than $1.7 million.

Regardless of whether there were technical errors in the court's charge on the evaluation of future earning capacity, moreover, the trial judge may well have been correct in suggesting, as he did in overruling a motion by the railroad to strike the economist's testimony in its entirety, that "if the Plaintiff wishes to spread their blanket clear across the courtroom" with an obviously overblown estimate of damages, "that will be to [the defendant's] advantage ultimately." The jury may or may not have been better equipped than Dr. Cobb was to guess the course of future inflation, and the jury probably had no idea of how to go about making present value calculations itself, but it would not be surprising if the judge was reading his jury accurately when he intimated that the jury would think it absurd to award this plaintiff $1.5 million or more in respect to future earnings. The jury could have reasoned that if invested in long term tax exempt municipal bonds paying 7% per annum, for example, a $1.5 million lump sum award could be expected to yield more than

$100,000 per year and quite possibly leave plaintiff, at his death, still a millionaire (in dollars of the day), if he managed to avoid invading his capital for living expenses. In the Eastern District of Kentucky, at least, it will probably take a good many years of high inflation before most people will feel railroad hands cannot make do on less than $100,000 a year.

Still, the thought processes of juries in Eastern Kentucky are no more susceptible to divination by outside agencies than are those of juries elsewhere, and we need not rest our decision on the proposition that any instructional error committed by the trial court in this case was harmless. Given the nature of the expert testimony presented here, and in view of the court's failure to give a present value charge, we think it would have been potentially more confusing for the jury to be told it could take inflation into account than to be told otherwise.

Conceptually, to be sure, it would have been perfectly appropriate for the plaintiff's expert witness to have factored inflation (or deflation) into his future earnings estimate, if there had been some rational basis for predicting what the future inflation or deflation would amount to and when it would occur, and if the witness discounted the projected future earnings by an interest rate reflecting comparable assumptions as to the future course of the dollar. This is not what Dr. Cobb claimed to have done, of course: he admitted that he could not predict what the rate of inflation would be in the future, he said he did not take inflation into account in projecting plaintiff's future earning, and he said he did not discount those earnings to present value with the kind of interest rate likely to obtain in

a world where investors assume there is at least some risk of inflation.

If plaintiff had proffered testimony to the effect that inflation could be expected to push his earnings up for 40 years or more at a compound annual rate of more than 7% (that being the inflation rate assumed by Dr. Cobb for one relatively minor part of his economic model), such testimony might have been subject to objection—at least if plaintiff's expert witness did not use a correspondingly high discount rate in reducing estimated future earnings to their present value. See *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir.1970), *cert. denied*, 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153 (1971) and *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir.1974). where this court indicated that testimony projecting significant wage increases far into the future is so speculative as to be inadmissible. Even if such testimony is inadmissible, however, it is well established that the jury may normally consider the possibility of future increases or decreases in the purchasing power of money. Thus in *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117, *supra*, we held that "[e]ven though no expert testimony on inflation and future increases was admitted, it was still error for the district court to charge the jury that it should not consider 'future increases or decreases in the purchasing power of money.'" *Id.* at 1122. *Cf. Morvant v. Construction Aggregates Corp.*, 570 F.2d 626 (6th Cir.), *cert. dismissed*, 439 U.S. 801, 99 S.Ct. 44, 58 L.Ed.2d 94 (1978), where we held it was reversible error to exclude expert testimony on the prospect of future wage increases.

It is equally clear, on the other hand, that the plaintiff in an FELA case is not entitled to recover more, in respect

of lost future income, than the present value of such income, and the jury ought to be so advised. *St. Louis Southwestern Railway Co. v. Dickerson,* 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). To let the jury take the prospect of future inflationary wage increases into account without clear guidance on the need for reducing future earnings to their present value would be grossly unfair to the defendant.

That unfairness would be particularly striking in the case at bar, where the only inflation rate ever mentioned was 7.42%, and where the jury, unless cautioned otherwise, could have inferred it was free to project that rate into the future for a period of 40 years or more. Without a proper present value instruction, this could have led to utterly ludicrous results—particularly in view of Dr. Cobb's testimony that a rough approximation of the earning loss could be arrived at by aggregating undiscounted annual earnings. In describing that rough approximation technique, which corresponds to the "total offset" approach discussed in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), Dr. Cobb did not intend to suggest, of course, that it would be appropriate to aggregate annual earnings after they had been adjusted upward for inflation. On the record of this case, however, Dr. Cobb having testified repeatedly that inflation made no significant difference, the jury might well have been confused by an instruction inviting it to take inflation into account.

Because of Dr. Cobb's testimony, we think it unnecessary to remand the case for a new trial in which the jury would be told both that it could take into account the possibility of future inflation and that projected future earn-

ings must be discounted to their present value. Advice from the trial court as to these two countervailing considerations would have added little or nothing to the jury's deliberations, because plaintiff's own evidence indicated that inflation in projected earnings is "washed out" by the inflation component of the interest rate used in present value calculations, and inflation therefore makes no difference in the determination of the value of future earnings. (We note also that although the "total wash-out" or "total offset" concept has not been accepted as a mandatory federal rule of decision, it is prominently featured on the menu of economic theories from which courts may currently choose in FELA cases. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768, *supra.* The "total offset" method of calculating the present value of future earnings depends on the validity of the method's implicit assumptions as to the relationship between the future course of wage rates and the future course of interest rates, and the time may come when those assumptions will be thought so wide of the mark that the method will have to be abandoned. In the case at bar, however, there is affirmative—and uncontradicted—evidence that the assumptions are currently tenable).

A federal appellate court reviewing a challenge to jury instructions is "required to judge the charge as a whole and to affirm the jury verdict if, taken as a whole [the trial court's charge] fairly presents the law as it applies to the case at hand." *Haislah v. Walton,* 676 F.2d 208, 212 (6th Cir.1982). Taking as a whole the charge given in this case, and considering it in relation to the evidence that was before the jury, we think the judgment entered on the jury's verdict ought to be affirmed. The charge

as given would have permitted the jury to award roughly $1.5 million for future lost earnings, if the jury had taken all of plaintiff's evidence at face value, and we are not persuaded that the charge, read in the light of the testimony, entitles plaintiff to another shot at a higher verdict.

AFFIRMED.